

**NO. 48408-1-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DARYL GLENN HARDING,**

**Appellant.**

---

**RESPONDENT'S BRIEF**

---

**RYAN JURVAKAINEN  
Prosecuting Attorney  
ERIC BENTSON/WSBA 38471  
Deputy Prosecuting Attorney  
Representing Respondent**

**HALL OF JUSTICE  
312 SW FIRST  
KELSO, WA 98626  
(360) 577-3080**

## TABLE OF CONTENTS

	PAGE
I. STATE’S RESPONSE TO ASSIGNMENT OF ERROR.....	1
II. ISSUES PERTAINING TO THE STATE’S RESPONSE TO ASSIGNMENT OF ERROR.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT.....	9
A. SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO FIND HARDING GUILTY OF BOTH ASSAULT CHARGES. ....	9
B. SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO FIND THAT, UNDER THE CIRCUMSTANCES IN WHICH IT WAS USED, THE BOARD WITH NAILS PROTRUDING OUT OF IT WAS A DEADLY WEAPON.....	12
C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE WHEN NO EVIDENCE WAS PRESENTED THAT THE LESSER OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE.....	15
D. BECAUSE CONFLICTING EVIDENCE WAS PRESENTED AS TO WHETHER HARDING’S CONDUCT PRECIPITATED A FIGHT, THE AGGRESSOR INSTRUCTION WAS APPROPRIATE .....	23
V. CONCLUSION .....	26

## TABLE OF AUHTORITIES

	Page
<b>Cases</b>	
<i>In re Rights of Waters of Stranger Creek</i> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	22
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	10
<i>State v. Anderson</i> , 144 Wn.App. 85, 180 P.3d 885 (2008).....	23
<i>State v. Bea</i> , 162 Wn.App. 570, 254 P.3d 948 (2011) .....	24
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999) .....	11
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	17
<i>State v. Bergeson</i> , 64 Wn.App. 366, 824 P.2d 515 (1992).....	18
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997) .....	17
<i>State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	17
<i>State v. Bowerman</i> , 115 Wn.2d 794, 802 P.2d 116 (1990).....	17
<i>State v. Condon</i> , 182 Wn.2d 307, 343 P.3d 357 (2015) .....	18, 22
<i>State v. Daniels</i> , 56 Wn.App. 646, 784 P.2d 579 (1990).....	15
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	11
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .....	16
<i>State v. Fowler</i> , 114 Wn.2d 59, 785 P.2d 808 (1990).....	16
<i>State v. Gottstein</i> , 111 Wn. 600, 191 P. 766 (1920) .....	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	10, 12

<i>State v. Hawkins</i> , 89 Wn. 449, 455 (1916) .....	24
<i>State v. Henderson</i> , 182 Wn.2d 734, 344 P.3d 1207 (2015).....	17
<i>State v. Johnson</i> , 29 Wn.App. 807, 631 P.2d 413, <i>review denied</i> , 96 Wn.2d 1009 (1981) .....	18
<i>State v. Jones</i> , 63 Wn.App. 703, 821 P.2d 543, <i>review denied</i> , 118 Wn.2d 1028, 828 P.2d 563 (1992).....	10, 11
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993).....	11
<i>State v. Karp</i> , 69 Wn.App. 369, 848 P.2 1304, <i>review denied</i> , 122 Wn.2d 1005, 859 P.2d 602 (1993).....	18
<i>State v. McPhail</i> , 39 Wn. 199, 81 P. 683 (1905) .....	15, 17
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984).....	22
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	9
<i>State v. Partosa</i> , 41 Wn.App. 266, 703 P.2d 1070 (1985).....	16
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997).....	17
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	24
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	9
<i>State v. Shilling</i> , 77 Wn.App. 166, 889 P.2d 948 (1995).....	13
<i>State v. Sorenson</i> , 6 Wn.App. 269, 492 P.2d 233 (1972) .....	13
<i>State v. Theroff</i> , 25 Wn.App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	10
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1992).....	17
<i>State v. Walton</i> , 64 Wn.App. 410, 824 P.2d 533, <i>review denied</i> , 119 Wn.2d 1011 (1992) .....	10

<i>State v. Wingate</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	23
<i>State v. Winings</i> , 126 Wn.App. 75, 107 P.3d 141 (2005).....	19, 21
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	16, 17, 18, 21
<i>United States v. Sinclair</i> , 144 U.S.App.D.C. 13, 444 F.2d 888, 890 (1971) .....	18

#### **Statutes**

RCW 9.94.825 .....	22
RCW 9A.04.110(4)(b) .....	13
RCW 9A.04.110(6).....	13
RCW 9A.16.020(3), (4) .....	24

**I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

Harding's convictions should be affirmed because:

- (1) There was sufficient evidence for the jury to find him guilty of both counts of assault in the second degree;
- (2) There was sufficient evidence for the jury to find the board with nails protruding out of it was a deadly weapon;
- (3) The trial court did not abuse its discretion when it did not instruct the jury on a lesser included offense, because no evidence was presented that the weapon used was not readily capable of causing substantial bodily harm; and
- (4) It was appropriate for the trial court to give the aggressor instruction, because there was conflicting evidence as to whether Harding precipitated a fight.

**II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

- A. Was sufficient evidence presented for the jury to find Harding guilty of two counts of assault in the second degree when he intentionally assaulted both victims with a deadly weapon?
- B. Was sufficient evidence presented that, in the manner in which it was used, the board with nails protruding out of it was a deadly weapon?
- C. Did the trial court abuse its discretion by declining to instruct the jury on a lesser included offense when no evidence was presented that the lesser offense was committed to the exclusion of the charged offense?
- D. Was it inappropriate for the trial court to give the aggressor instruction when conflicting evidence was presented as to whether Harding's conduct precipitated a fight?

### **III. STATEMENT OF THE CASE**

Greg Stark lived in upstairs apartment number three (“#3”) at 1013 North Third Avenue in Kelso. 2RP at 65-67. Stark had two chairs outside his apartment, and neighboring apartment number four (“#4”) had one chair outside. 2RP at 67. About three days before July 8, 2015, while headed to a medical appointment, Stark observed Daryl Harding sitting in front of apartment #4. 2RP at 68. When Stark returned to his apartment, Harding was sitting in one of Stark’s chairs in front of his apartment. 2RP at 68. Harding asked Stark for a cigarette, and Stark gave him one. 2RP at 68. Over the next two days, Harding remained outside of Stark’s apartment. 2RP at 68. Whenever Stark left his apartment, Harding asked for a cigarette, and Stark would give him one. 2RP at 69.

After about three days, Stark and his girlfriend became nervous about Harding sitting in front of his apartment. 2RP at 70. On July 8, 2015, Stark was leaving his apartment to take his girlfriend to an appointment, when he again observed Harding sitting in one of his chairs in front of his apartment. 2RP at 70. As he had before, Harding requested a cigarette. 2RP at 71. This time Stark told him that he could not afford to keep giving Harding cigarettes. 2RP at 71. Harding then pulled a \$10 bill out of his sock and showed it to Stark. 2RP at 71. Stark told Harding

that he needed to go buy himself a pack of cigarettes and also asked, “[W]ould you please not sit in front of my apartment – you are making my girlfriend nervous[?]” 2RP at 71.

Later that night, Stark’s friend Norm Jensen came to Stark’s apartment. 2RP at 72. Stark and Jensen left Stark’s apartment to go to the store where they purchased a six-pack of beer. 2RP at 72-73. When they returned to Stark’s apartment, Harding was sitting in the single chair in front of apartment #4. 2RP at 73. Harding called Stark, who was Native American, a profane racial slur. 2RP at 66, 73. Stark’s downstairs neighbor, who was also Native American, heard Harding and also came outside of his apartment. 2RP at 73-74. Stark told Harding to get off his porch and said, “[Y]ou’ve been camping out for three days now; you don’t belong here.” 2RP at 74. Stark called Harding a profane racial slur. 2RP at 74. Both Stark and Jensen went inside Stark’s apartment. 2RP at 74. Harding remained outside of Stark’s apartment and continued to use profanity and call Stark racial slurs. 2RP at 75. Stark then closed his door—which was sliding glass—and called the police to ask them to remove Harding. 2RP at 75-76, 80, 96. From outside the sliding glass door, Harding threatened Stark saying was going to get him. 2RP at 96.

Officers John Johnston and Tim Gower of the Kelso Police Department responded to Stark’s call. 2RP at 108-09, 112. They went



upstairs and observed Harding sitting outside of apartment #4. 2RP at 113. Initially, Officer Johnston contacted Stark inside apartment #3 and Officer Gower contacted Harding. 2RP at 113-14. After speaking with Stark, Officer Johnston contacted Harding. 2RP at 114. Harding told Officer Johnston he was transient, had been staying in front of apartment #4, did not know anyone in the apartments, and that he was willing to leave. 2RP at 114-15.

The officers walked down the stairs with Harding, toward the street. 2RP at 115. Harding told Officer Johnston that “tweakers” in the apartment had stolen his guitar and amplifier. 2RP at 115. Officer Johnston attempted to investigate the theft of Harding’s property. 2RP at 116. Officer Johnston requested a description of the stolen amplifier. 2RP at 116. However, Harding would only provide minimal information. 2RP at 116. Harding became angry, told Officer Johnston he was not going to do anything about it, then said, “Forget it. I’m leaving,” and left. 2RP at 116.

Harding eventually returned to the apartments. 2RP at 98. After being in Stark’s apartment for a while, it was time for Jensen to return home. 2RP at 98. Because Harding was outside, Stark suggested that Jensen let him walk him home. 2RP at 98. Jensen opened the door and exited Stark’s apartment. 2RP at 99.

Harding swung a board with nails sticking out of it at Jensen's head. 2RP at 99. Jensen was able to put his hand up to protect his head. 2RP at 99. Harding struck Jensen in the hand, driving a nail through his finger. 2RP at 100, 102-03. Due to having a nail driven into his finger, Jensen was unable to make a fist for about a month's time afterward. 2RP at 102. Harding again swung the board at Jensen, this time striking him on the shoulder. 2RP at 100. Stark exited and spun Jensen around. 2RP at 100. Harding then hit Jensen for a third time with the board, in the stomach. 2RP at 100. Stark pushed Jensen into the house. 2RP at 100.

Stark grabbed the board to prevent Harding from continuing to assault them. 2RP at 79. Harding was too strong for Stark and pulled the board from Stark's hand, cutting him in the hand. 2RP at 79, 81. Harding then swung the board at Stark's head. 2RP at 79. Stark raised his arm to block the blow and Harding struck Stark multiple times in the forearm with the spiked board. 2RP at 79. One of the nails protruding from the board punctured Stark's arm, leaving a scar. 2RP at 79, 81. While Stark bled some, the majority of the bleeding came from Jensen's bleeding hand. 2RP at 82-83.

After pushing Jensen into the apartment, Stark closed his sliding glass door. 2RP at 80. Harding then began to strike Stark's sliding glass door with the board, attempting to break it. 2RP at 80. Stark called the

police. 2RP at 81. Officers Johnston and Gower responded to Stark's call. 2RP at 117, 139. The police went back up the stairs, where they observed Harding sitting in the chair outside of apartment #4. 2RP at 139. Upon seeing the police Harding stood up, placed his hands behind his back, and said, "I'm putting my hands behind my back; arrest me; I got my point across." 2RP at 118. Harding was arrested. 2RP at 118. Propped up against the chair he was sitting in, was the board with nails sticking out that he had used to strike Stark and Jensen. 2RP at 121.

Harding was charged with two counts of assault in the second degree for intentionally assaulting Jensen and Stark with a deadly weapon, both with deadly weapon enhancements, and the case proceeded to trial. 2RP at 5. During the trial, Jensen, Stark, Officer Johnston, and Officer Gower testified. 2RP at 65-141, 179-180. The spiked board was admitted into evidence. 2RP at 126-27. Officer Johnston testified that not only did the board present the potential for breaking things, but due to the nails it could also puncture. 2RP at 127-28. Officer Johnston explained that this posed a real danger to the eyes of those struck with the board, and if a nail caught a person in the wrong location it could kill that person. 2RP at 128.

Harding also testified. 2RP at 147-168. Harding said he was sitting outside apartment #4, when Stark and Jensen came out drunk. 2RP

at 157. Harding testified that Jensen said to him, "What the f\*\*\* are you looking at?" 2RP at 158. Harding said that Jensen called him a racial slur and asked how much money he had. 2RP at 159. Harding claimed that Stark and Jensen were "deliberately trying to pick a fight with me." 2RP at 160. Harding said Stark then called the police and accused him of trespassing. 2RP at 160. Harding related that the police discussed the stolen guitar with him and that he became frustrated and walked off. 2RP at 161. Harding said that after the police left he returned to the chair upstairs. 2RP at 162.

Harding said that Stark and Jensen argued with him, calling him racial slurs and that he responded with racial slurs. 2RP at 162. Harding testified that the "Indian that lives downstairs, he comes upstairs and hears us arguin'." 2RP at 162. Harding said the third man from downstairs was staring at him and told him he would kill him if he disrespected his people. 2RP at 163. Harding said he told the three men: "You're all a bunch of bitches. You want to take my money, you come and take my money." 2RP at 164. Because he was outnumbered, Harding said he put his hand behind his back pocket to make the men think he had a knife. 2RP at 164. Harding then challenged the men to come and take his money. 2RP at 165.

Harding testified that the third man said he had something for him and went downstairs to his apartment. 2RP at 165. Harding said that he then looked for a “any kind of weapon” he could find. 2RP at 165. After Harding found the board with the nails sticking out, he returned to the top of the stairs. 2RP at 165. Harding said the third man came halfway up the stairs. 2RP at 165. Harding said the third man observed him with the weapon, and Harding challenged him to come take his money. 2RP at 165. Then, still holding the board, Harding challenged Stark and Jensen to “[c]ome on out here and take my money.” 2RP at 166.

Harding testified that Stark and Jensen came at him “like defensive linemen getting ready to rush a quarterback.” 2RP at 166. Harding testified that he struck Jensen in the head, then struck him again, knocking him down to one knee. 2RP at 166. Harding said he then “went after” Stark. 2RP at 166-67. Harding testified to hitting Stark two or three times and that he went down. 2RP at 167. Upon observing what Harding had done, the third man then ran. 2RP at 167. Harding said he told the third man, “Come back here bitch you forgot to take my money.” 2RP at 167.

Harding admitted that the spiked board was a weapon and that it would cause pain to be stabbed with the nails on the end of the board. 2RP at 165, 173-74. Harding did not claim that the board was not a weapon, but rather claimed he was justified in using it because he was

outnumbered, being attacked, and needed to defend himself. 2RP at 175-76.

After the witnesses had testified, the State offered several jury instructions, including the aggressor instruction. 3RP at 10. The court gave this instruction. 3RP at 11. The defense proposed a lesser included instruction for assault in the fourth degree on both of the assault in the second degree charges. 3RP at 19-20. The court declined to instruct the jury on the lesser included instruction because no evidence was presented that an assault was committed without the use of the deadly weapon. 3RP at 29. The jury found Harding guilty as charged. 3RP at 76.

#### **IV. ARGUMENT**

##### **A. Sufficient evidence was presented for the jury to find Harding guilty of both assault charges.**

Taken in the light most favorable to the state there was sufficient evidence for the jury to find Harding guilty of both assaults. The Washington Supreme Court has stated:

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)); *State v.*

*Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Harding claims that there was insufficient evidence to disprove self-defense beyond a reasonable doubt, and on this basis he claims his assault convictions must be reversed. However, when all reasonable inferences are drawn in favor of the State and interpreted most strongly against Harding, there was sufficient evidence to support the jury's verdicts.

When determining the sufficiency of evidence the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant

admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-08. "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

Here, there was sufficient evidence for the jury to find Harding was not acting in self-defense when he struck Stark and Jensen with the spiked board. Stark testified that he heard a thump, turned and saw Jensen being struck by Harding with the "this piece of wood with a nail stickin' out of it." 2RP at 78. After pushing Jensen into the house, Stark testified that he tried to grab the weapon, but Harding was too strong. 2RP at 79. Harding struck Stark several times, cutting him with the nails sticking out of the board. 2RP at 79. Stark was struck by a nail in his forearm while trying to protect his head from being hit. 2RP at 79.

Jensen testified that immediately after walking outside, Harding hit him with the "[p]iece of wood with nails in it." 2RP at 99. Harding struck



Jensen in the hand, only because Jensen put it up in time to protect his head. 2RP at 99. As Stark pushed Jensen into the house, Harding hit Jensen again with the spiked board in the stomach. 2RP at 100. The fact that Harding testified that he acted in self-defense, does not mean that there was insufficient evidence to prove an intentional assault. It appears that the jury simply disbelieved Harding's version, and found that Stark and Jensen were credible. While the jury was not required to believe Stark or Jensen's testimony, taken in the light most favorable to the State, there was sufficient evidence for the jury to infer that Harding attacked Stark and Jensen and was not acting in self-defense.

**B. Sufficient evidence was presented for the jury to find that, under the circumstances in which it was used, the board with nails protruding out of it was a deadly weapon.**

There was sufficient evidence for the jury to find the spiked board Harding used to assault Jensen and Stark was a deadly weapon. When determining the sufficiency of the evidence the issue remains "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *Green*, 94 Wn.2d at 221. Harding claims that the spiked board was not a deadly weapon, however his argument fails to consider that, under the circumstances in which it was used, the

spiked board was readily capable of causing death or substantial bodily harm.

“An item is a deadly weapon if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm.” *State v. Shilling*, 77 Wn.App. 166, 171, 889 P.2d 948 (1995); RCW 9A.04.110(6). Surrounding circumstances to consider include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied, and the physical injuries inflicted.” *State v. Sorenson*, 6 Wn.App. 269, 273, 492 P.2d 233 (1972). “Ready capability is determined in relation to the surrounding circumstances, with reference to potential substantial bodily harm.” *Shilling*, 77 Wn.App at 171. “‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]” RCW 9A.04.110(4)(b).

Here, under the circumstance, there was sufficient evidence presented for the jury to find that the board with nails protruding out of it was a deadly weapon. First, with respect to the intent and present ability of the user, Harding’s objective—even by his own admission—was to strike Stark and Jensen. Harding swung the spiked board at the Stark and Jensen’s heads. Harding struck both men multiple times, and once they

got inside the house and slid the door closed, Harding continued to strike Stark's sliding glass door. Second, the degree of force used was also substantial. Harding delivered the blows with such force that a nail punctured Stark in the forearm. 2RP at 79. He also drove the nail through Jensen's finger and left a mark on his shoulder. 2RP at 102-03. Jensen's injury bled profusely. 2RP at 82-83.

Third, the part of the body to which the strikes were applied created a great risk of substantial bodily harm or death. Harding swung the spiked board at the heads of both men.<sup>1</sup> 2RP at 79, 99. He also struck Jensen in the stomach. 2RP at 100. Both men suffered the majority of their injuries while attempting protect their heads from Harding's blows. 2RP at 79, 99. A blow to the head with a solid piece put Stark and Jensen at risk for nasal fractures, skull fractures, and tooth fractures. Further, the nails protruding from the board could easily have caused the loss of an eye or permanent facial scarring. Had the nails ripped through Jensen's stomach, he could have suffered severe internal injuries. And, finally, driving a nail through a person's throat or hitting someone in the head with a board—or any hard object—can obviously result in death. Fourth, there was evidence Harding actually did inflict substantial bodily injury. Jensen had a nail driven through his finger and was unable to make a fist

---

<sup>1</sup> Harding himself testified that he had struck Jensen in the head and struck both men until they went down. 2RP at 166-67

for about a month's time afterward. 2RP at 102-03. A nail also went into Stark's arm, leaving a scar. 2RP at 81-82. When all the factors are considered, under the circumstances in which it was used, the spiked board was readily capable of causing substantial bodily harm or death.<sup>2</sup> Consequently, there was sufficient evidence for the jury to find the spiked board was a deadly weapon.

**C. The trial court did not abuse its discretion by declining to instruct the jury on a lesser included offense when no evidence was presented that the lesser offense was committed to the exclusion of the charged offense.**

The trial court did not abuse its discretion in declining to instruct the jury on assault in the fourth degree, because no evidence was presented from which the jury could find that assault in the fourth degree was committed without also committing the charged offense of assault in the second degree. “[A] defendant may only be convicted of a lesser degree when there is evidence that the lesser crime alone has been committed.” *State v. Daniels*, 56 Wn.App. 646, 651, 784 P.2d 579 (1990) (citing *State v. McPhail*, 39 Wn. 199, 203, 81 P. 683 (1905); *State v. Gottstein*, 111 Wn. 600, 602, 191 P. 766 (1920)). At trial, the State

---

<sup>2</sup> Harding's reliance on *State v. Skenadore*, 99 Wn.App. 494, 994 P.2d 291 (2000), is misplaced, as the facts are easily distinguishable. In *Skenadore* the alleged weapon was a roll of paper with a pencil, there was no testimony that the instrument came near the victim's head, and the item was never presented in evidence for the jury to examine. *Id.* at 500. Here, the weapon was a wooden board with the sharp end of nails sticking out, Harding attempted to strike both men in the head with the board, and it was admitted into evidence for the jury to view.

presented evidence that Harding struck Jensen and Stark with the spiked board. The defense presented no evidence showing the spiked board Harding used was not readily capable of producing substantial bodily harm. Thus, no evidence was ever presented that the Harding had not used a deadly weapon. Although the legal prong for a lesser included offense existed, the evidence presented at trial failed to establish the factual prong. Accordingly, the trial court did not abuse its discretion when it considered all the evidence presented and determined that it was insufficient to show the lesser offense had been committed to the exclusion of the charged offense.

“A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged and (2) the evidence supports an inference that only the lesser crime was committed.” *Id.* at 650 (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Partosa*, 41 Wn.App. 266, 269-79, 703 P.2d 1070 (1985)). To satisfy the second prong of the *Workman* rule, “the evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State*

*v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). While the legal prong of the *Workman* rule is reviewed *de novo*, an appellate court will “review a trial court’s decision regarding the second prong of the *Workman* rule for abuse of discretion.” *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1992)).

“[I]f there is no testimony tending to prove the commission of any of the lesser crimes charged, the court is not required to submit such lesser crimes to the jury, and commits no error in its refusal so to do.” *McPhail*, 39 Wn. at 206. Of course, “[i]t would be error to give an instruction not supported by the evidence.” *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) (citing *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993)). Moreover, to instruct the jury on a lesser included offense requires a “factual showing that is more particularized than that required for other jury instructions. Specifically ... the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Id.* at 455 (citing as examples, *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (lesser included offense instruction); *State v. Peterson* 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (inferior offense instruction)). “[T]here must be some rational basis for the lesser charge; otherwise it is merely a device for [a]

force was sufficient to cut a hole through a leather shoe and had the sword land differently the victim's toe may have been injured or even severed. *Id.* at 89. Thus, Winings was not entitled to a lesser degree instruction of assault in the fourth degree. *Id.*

Here, the court did not abuse its discretion when it declined to give a lesser included instruction, because the evidence did not support a rational inference that the assault was committed only with a non-deadly weapon. The defense presented no evidence to show the board with nails protruding from the end that Harding swung at the victims' heads was not a deadly weapon. Thus, no affirmative evidence was presented that would support the crime of assault in the fourth degree to the exclusion of the crime assault in the second degree.

Of course, the trial court was best-positioned to evaluate the circumstances under which Harding had struck Jensen and Stark with the spiked board and was able to view the weapon that was admitted into evidence. All parties agreed that Harding had struck the men with the weapon. Stark and Jensen both testified that Harding had swung the spiked board at their heads. 2RP at 79, 99. Harding agreed that the board was a weapon and acknowledged the danger of being stabbed with nails in the board. 2RP at 173-74. He also testified that he struck Jensen in the head, knocking him to his knees. 2RP at 166. Harding testified to

knocking Stark down and to striking both men numerous times. 2RP at 166-67. Harding claimed that he needed to use the spiked board to defend himself because the two men came at him “like defensive linemen getting ready to rush a quarterback.” 2RP at 166. Thus, at no time was there any ambiguity as to how Harding was using the spiked board. Jensen, Stark, and Harding all agreed that the strikes were toward the heads of Stark and Jensen. Both men had wounds from having nails driven into them while trying to protect their heads, and both were struck multiple times.

Under the circumstances in which it was used, it was obvious that the spiked board was a deadly weapon. As in *Winings*, the record at trial did not support a rational inference that the assault was committed only with a non-deadly weapon. The description of the spiked board’s use by all three men was that it was used in such a way that it was readily capable of inflicting substantial bodily harm. Just as the cutting of the shoe in *Winings* indicated the level of force used was potentially deadly, here Harding stabbed both men with the nails on the board while swinging it at their heads. Had they been unable to deflect these blows, the victims may have lost eyes, suffered fractured body parts, substantial disfigurement, or even been killed.

Thus, the trial correctly applied the factual prong of the *Workman* rule to the facts presented at the trial. No affirmative evidence was



presented to support a lesser offense having been committed to the exclusion of the charged offense. For this reason, the court did not abuse its discretion in declining to instruct the jury on the lesser included offense.

Finally, even if Harding's testimony were construed in a manner that required the trial court to give the lesser included instruction, any error would be harmless.<sup>3</sup> The jury not only found that Harding committed both assaults with a deadly weapon, but also found that a deadly weapon enhancement applied to both assaults. Because the jury unanimously found the weapon met the more stringent definition of a deadly weapon that was required to establish a deadly weapon enhancement,<sup>4</sup> it is not reasonable to conclude that giving a lesser degree instruction would have caused the jury not to find the less stringent definition of deadly weapon that applied to the element of the crime. Consequently, Harding would have been found guilty of assault in the

---

<sup>3</sup> Current controlling precedent holds the erroneous failure to instruct the jury on a lesser included offense necessitates reversal. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984). However, precedent may be overturned when it is both incorrect and harmful. *Condon*, 182 Wn.2d at 327 (citing *In re Rights of Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). In *Condon*, the court held the failure to argue that *Parker* was incorrect and harmful prevented the court from reconsidering this issue. *Id.* Because this precedent would be incorrect and harmful if applied here, the State raises this argument to preserve the issue.

<sup>4</sup> RCW 9.94.825 provides the definition for deadly weapon that applies to a sentencing enhancement: "For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death."

the second degree regardless of whether the lesser included instruction was given.

**D. Because conflicting evidence was presented as to whether Harding's conduct precipitated a fight, the aggressor instruction was appropriate.**

The trial court did not err in giving the aggressor instruction because conflicting evidence was presented as to whether Harding's conduct precipitated a fight. "An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *State v. Wingate*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). At trial Harding's testimony as to what occurred differed from Stark's and Jensen's. The jury was permitted to consider all the evidence presented and draw whatever reasonable inferences could be drawn. Accordingly, when all evidence and reasonable inferences are considered, there was sufficient evidence for the court to give the aggressor instruction.

"A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant provoked the fight; or (3) the evidence shows the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn.App. 85, 89, 180 P.3d 885 (2008). Although "words alone" do not constitute sufficient

provocation for giving an aggressor instruction, “[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.” *State v. Riley*, 137 Wn.2d 904, 909-911, 976 P.2d 624 (1999). The provocative act need not be the striking of the first blow. *State v. Hawkins*, 89 Wn. 449, 455 (1916). Further, a trespass has been found sufficient provocation to allow an aggressor instruction, when the owner of a property uses force to expel a malicious trespasser. *State v. Bea*, 162 Wn.App. 570, 578, 254 P.3d 948 (2011); *See also*, RCW 9A.16.020(3), (4).

Here, the aggressor instruction was appropriate. First, there was sufficient evidence for the jury to find Harding provoked the fight. The jury heard that Harding attacked Jensen. Then in an effort to defend Jensen, Stark attempted to grab the weapon from Harding. Harding then assaulted Stark. Harding’s provocation in assaulting Jensen did not allow him to assault Stark when he assaulted Harding in defense of Jensen. Additionally, there was testimony from Harding himself about him taking several actions to provoke the fight. He testified that he pretended to have a knife while arguing with the men. He also stated that while holding the spiked board he challenged Stark and Jensen to come take his money.

Thus, by his conduct, the jury could have found Harding provoked the fight.

Second, there was conflicting testimony as to who precipitated the fight. Jensen and Stark testified that after an exchange of words with Harding earlier, they exited the apartment and were attacked by him. On the other hand, Harding testified that after the argument, a third man went downstairs to retrieve a weapon. Harding said he then obtained his weapon. He testified that Jensen and Stark came at him like defensive linemen rushing a quarterback so he hit them. The jury was entitled to consider all of this evidence, and was not required to adopt either version in its totality. Among the possibilities, the jury could have found Harding's presentation of the weapon justified Stark and Jensen rushing at him. By threatening the men with a weapon, Harding was not then justified in using that weapon in self-defense because he had provoked the fight.

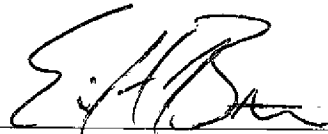
Finally, there was also evidence presented that Harding made the first move by drawing a weapon. Harding testified that after obtaining the weapon, he stood and challenged Jensen and Stark, telling them to come take his money. 2RP at 166. Harding had already stated he was going to get Stark. 2RP at 96. His prior threat and challenge, combined with his presentation of the weapon, was sufficient evidence for the jury to find he

made the first move when he drew the weapon. Further, Harding, who had already been asked to leave by the police, had returned just outside the front door of Stark's apartment and was now threatening him with a weapon. Stark would have been justified in using force to expel Harding, who at this point presented as a malicious trespasser. Accordingly, the aggressor instruction was properly given.

V. **CONCLUSION**

For the above stated reasons, Harding's convictions should be affirmed.

Respectfully submitted this 23<sup>rd</sup> day of November, 2016.

  
ERIC H. BENTSON  
WSBA # 38471  
Deputy Prosecuting Attorney  
Representing Respondent

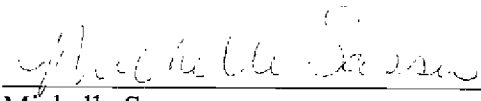
### **CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Peter Tiller  
The Tiller Law Firm  
P.O. Box 58  
Centralia, WA 98531-0058  
[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Nov 23<sup>rd</sup>, 2016.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**November 23, 2016 - 3:20 PM**

## Transmittal Letter

Document Uploaded: 3-484081-Respondent's Brief.pdf

Case Name: State of Washington v. Daryl Glenn Harding

Court of Appeals Case Number: 48408-1

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: [sasserm@co.cowlitz.wa.us](mailto:sasserm@co.cowlitz.wa.us)

A copy of this document has been emailed to the following addresses:

[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)